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Supreme Court of the United States

October Term, 1979

No. 79-198

THE SUPREME COURT OF VIRGINIA, *et al.*,
Appellants,

v.

CONSUMERS UNION OF UNITED STATES, INC., *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

BRIEF FOR THE APPELLEES

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BRIEF FOR THE APPELLEES

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

In addition to the statutory provision and rule set forth by appellants, the Fourteenth Amendment and 42 U.S.C. § 1983 are directly relevant to this case. Insofar as they are pertinent, they are here set forth:

The Fourteenth Amendment provides:

> Section 1 . . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * *

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulations, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

QUESTIONS PRESENTED

1. Do the common law doctrines of judicial and legislative immunity shield state judges from suits brought under 42 U.S.C. § 1983 for declaratory and injunctive relief from an unconstitutional attorney disciplinary rule?

2. Was the Three-Judge District Court correct in following this Court's holding in *Hutto* v. *Finney*, 437 U.S. 678 (1978) and awarding attorneys' fees and costs under the Civil Rights Attorney's Fees Awards Act against state judicial officers, in their official capacity, to be paid from state funds, where no special circumstances rendered such an award unjust?

STATEMENT OF THE CASE

In 1974, Consumers Union of United States, Inc.[1] and the Virginia Citizens Consumer Council[2] (hereinafter referred to collectively as the "consumer groups") sought to publish an attorney directory for Arlington County, Virginia. Studies had documented that an enormous number of consumers with legal problems did not seek the advice of attorneys because unfamiliar with available legal services.[3] To educate and assist their members and other consumers in obtaining legal counsel, the consumer groups attempted to publish a model attorney directory for Arlington County. The directory was to contain such information as attorneys' areas of practice, legal fees and fluency in foreign languages. That model was to be made available at cost to citizen groups and bar associations that wished to compile similar directories for other localities.[4]

However, the consumer groups were precluded from gathering any information for the directory because of

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[1]Consumers Union of United States, Inc. is a New York not-for-profit corporation chartered in 1936 to provide information, education and counsel about consumer goods and services and the management of the family income. It publishes *Consumer Reports*, a monthly magazine with a circulation of over 2 million, which regularly carries articles on its own product testing, professional services, product safety, marketplace economics, and legislative, judicial and regulatory actions that affect consumers. Consumers Union's publications carry no advertising and receive no commercial support. Consumers Union represents the interests of its members through testimony before Congress and executive agencies and through litigation in the courts.

[2]Virginia Citizens Consumer Council is a nonprofit, statewide consumer organization chartered by the State of Virginia in 1967 to educate and to promote the rights of its members.

[3]See *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 376 (1977).

[4]In fact, the D.C. Bar Association has published a directory based on the consumer groups' model.

Disciplinary Rule 2-102(A)(6) of the Virginia Code of Professional Responsibility ("Rule"). That Rule permitted attorneys to participate only in directories that contained very limited types of information. Because the consumer groups' directory was to include additional factual information, lawyers who participated in the directory would be engaging in conduct deemed unethical by the Rule, and subject to disciplinary action, including disbarment, by the Virginia Supreme Court ("Virginia Court" or "Court").[5]

In order to protect their First Amendment rights and the First Amendment rights of their members and the public to receive, gather and publish truthful factual information on available professional legal services, the consumer groups commenced this action under 42 U.S.C. § 1983 in the United States District Court for the Eastern District of Virginia in February of 1975. Their complaint sought a declaration that the Virginia Court and Virginia Bar Association ("Bar") had infringed on these rights and an injunction enjoining their enforcement of the Rule (App. 20).[6] A Three-Judge District Court was convened on April 14, 1975.

On June 16, 1975, while this case was pending, the Supreme Court established, in *Bigelow* v. *Virginia,* 421, U.S. 809 (1975), that commercial speech enjoys a measure of First Amendment protection. In response to that decision, the Bar submitted to the Virginia Court a proposed amendment to the Rule.

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[5]The Chief Justice and other justices of the Virginia Supreme Court are referred to in this brief as the "Virginia Supreme Court", "Virginia Court" or "Court".

[6]Throughout this brief, references to "App." refer to the Appendix filed with the Court. References to "J.S." refer to the Jurisdictional Statement.

The Virginia Court rejected that amendment on April 20, 1976, stating only that this change would "not serve the best interests of the public or legal profession." (App. 34). Although the Virginia Court has authority to amend its disciplinary rules on its own initiative (Va. Code § 54-48) it took no action to bring its contested Rule into compliance with the Supreme Court's ruling. When the Supreme Court, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748 (1976), held that consumers enjoy a First Amendment right to receive price information on drugs, the Virginia Court again failed to amend its Rule to comport with First Amendment freedoms.

On December 17, 1976, the District Court held the Rule to be unconstitutional, except insofar as it prohibited publication of fees other than an initial consultation fee. 427 F.Supp. 506 (E.D.Va. 1976). The Virginia Court and Bar appealed to this Court the District Court's decision partially invalidating the Rule. The consumer groups appealed from the decision upholding the ban on the publication of most fee information.

While those appeals were pending, this Court decided *Bates* v. *State Bar of Arizona,* 433 U.S. 350 (1977), holding that the First Amendment protects the advertising of information on fees for routine legal services. Two days after that decision, this Court vacated the District Court decision in this case and remanded for a decision consistent with *Bates.*

The consumer groups, on May 15, 1978, moved in the District Court for a judgment on the merits, a permanent injunction and an order declaring defendants' liability for fees and costs. Contrary to its position now,

the Virginia Court then conceded that declaratory and injunctive relief should be granted against the Court, and submitted a proposed Order providing for such relief (App. 35). However, the Court did oppose the motion for a fee and cost award.

On May 8, 1979, the District Court declared that the entire directory is constitutionally protected and that the Rule is unconstitutional on its face. The District Court enjoined the Virginia Court and Bar from enforcing the Rule and determined that the consumer groups are entitled to reimbursement for their attorneys fees and costs under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988. Rather than award fees and costs against the Bar, to be paid from members' dues, the District Court awarded fees and costs only against the Virginia Court, to be paid from the State's funds. In doing so, the District Court followed this Court's holding in *Hutto* v. *Finney, supra,* 437 U.S. at 699 n.32 that good faith is not a defense to the award of attorney's fees under the Act and further found that no special circumstances existed which would render such an award unjust.

The Virginia Court appealed from the District Court's grant of declaratory and injunctive relief and from the award of fees and costs. Although this suit had been commenced in February of 1975, it was not until after the District Court's decision awarding fees and costs, over four years later, that the Virginia Court claimed judicial immunity as a defense to the claim for injunctive and declaratory relief. Its claim to legislative immunity is even more of an afterthought, being raised only in the brief on the merits filed herein by the Virginia Court.

The consumer groups appealed the District Court's decision not to enter a fee award against the Bar. Probable jurisdiction was noted over the Virginia Court's appeal on October 15, 1979. No action has been taken on the consumer groups' appeal.

SUMMARY OF ARGUMENT

Neither judicial nor legislative immunity shield the Virginia Court from suit under 42 U.S.C. § 1983 for prospective declaratory and injunctive relief. To extend these common law immunity doctrines to this case is unwarranted, unprecedented and unsupported by public policy. Such a decision, in conjunction with this Court's decision that civil damage suits cannot be brought against judges who intentionally or wantonly violate constitutional rights, would elevate state judges above the constraints of the Constitution, nullifying the Supremacy Clause and destroying constitutional guarantees.

In any case, these immunities apply only to judicial and legislative acts. They do not preclude prospective declaratory and injunctive relief from the administrative and prosecutorial acts at issue in this case.

The District Court correctly followed this Court's decision last term in *Hutto* v. *Finney,* 437 U.S. 678 (1978), by awarding fees and costs against the state judicial officers, in their official capacity, to be paid with state funds. Wherever state governmental immunities do not bar the underlying action, those immunities do not bar a fee award from state funds under the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988. The District Court acted well within its discre-

tion in entering this award because no special circumstances exist that render the award unjust.

ARGUMENT

I. THE CONSUMER GROUPS CAN SUE THE VIRGINIA COURT FOR PROSPECTIVE DECLARATORY AND INJUNCTIVE RELIEF FROM ITS UNCONSTITUTIONAL RULE.

A. Judicial Immunity Does Not Preclude Prospective Relief From Constitutional Wrongs.

Disciplinary Rule 2-102(A)(6) of the Virginia Code of Professional Responsibility indisputably violated the constitutional rights of the consumer groups and the public to gather, publish and receive information on available legal services. Although the Virginia Court now concedes the unconstitutionality of its Rule, it claims immunities that would leave the consumer groups and the public defenseless against its infringement of their constitutional rights.[7] The Virginia Court never

[7]Because the Virginia Court refused to amend its Rule, an injunction against the Rule's enforcement was required to assure attorneys that disciplinary proceedings would not be brought under the Rule and to make possible the publication of the directory. The immunities asserted by the Virginia Court would defeat the injunction granted in this case prohibiting all enforcement of the Rule, including enforcement by the Virginia Court, *sua sponte,* and would perpetuate the unconstitutional chill cast by the Rule on constitutional freedoms.

In *Dombrowski* v. *Pfister,* 380 U.S. 479, 492 (1965), the Supreme Court found civil rights activists to be entitled to an injunction against state officers because "the denial of injunctive relief may well result in the denial of effective safeguards against the loss of protected freedoms of expression and cannot be justified." Here too, an injunction against all forms of enforcement of the un-

claimed these immunities during the four years of litigation that preceded the decision from which this appeal is taken. In fact, on remand, that Court asked the District Court to enter an order declaring the Rule unconstitutional and enjoining the Virginia Court from enforcing the Rule against attorneys for providing information for the directory. (A. 35). The Virginia Court is challenging the authority of the District Court to grant prospective declaratory and injunctive relief from its constitutional wrongs solely to defeat the fee and cost award granted in this case.[8]

Never during the history of this country has the Supreme Court ever applied governmental immunities to preclude prospective relief against judges' unconstitutional conduct. The Virginia Court's claim to immunity

constitutional rule was required to safeguard first amendment rights. The need for that injunction was especially strong because the Virginia Court had not amended the Rule for almost two years since *Bates* was decided, and well-publicized criminal indictments had been brought against a Virginia attorney for advertising truthful information virtually identical to the information held to be constitutionally protected in *Bates.*

Because the rule had numerous unconstitutional applications, outside the specific facts of this case, the district court correctly invalidated the Rule altogether. *Coates* v. *City of Cincinnati,* 402 U.S. 611 (1971) (Black, J. concurring); *Smith* v. *People,* 361 U.S. 147, 151 (1959); *Baggett* v. *Bullitt,* 377 U.S. 360 (1964).

[8]To establish their entitlement to the fee and cost award, the consumer groups need only show that they were properly granted declaratory relief against the Virginia Court and, therefore, prevailed. The availability of declaratory relief is an issue distinct from the propriety of injunctive relief. *Stefell* v. *Thompson,* 415 U.S. 452 (1974); *Zwickler* v. *Koota,* 389 U.S. 241, 254-5 (1967). Declaratory relief may more readily be obtained from the state than injunctive relief. *Perez* v. *Ledesma,* 401 U.S. 82, 104 (1971) (Brennan, J. concurring).

here is unprecedented, unwarranted and unsupported by public policy. Acceptance of these claims would elevate state judges above the strictures of the Constitution, nullify constitutional guarantees and overturn over 100 years of principled decisionmaking by the Supreme Court establishing that state officials are bound by the Constitution.

The U.S. Constitution, Article 6, clause 2, explicitly requires state judges to comply with its mandates:

> This constitution, and the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or laws of any State to the Contrary notwithstanding.

To safeguard constitutional rights from state infringement, the Supreme Court has consistently upheld the right of citizens to sue state officials for prospective declaratory and injunctive relief. *Ex parte Young,* 209 U.S. 123, 159-160 (1908); *Fitzpatrick* v. *Bitzer,* 427 U.S. 445 (1976). Governmental immunities that bar damage awards against the State do not preclude prospective relief from unconstitutional State conduct because, as explained by Professor Charles Alan Wright, "the doctrine of *Ex parte Young* seems indispensable to the establishment of constitutional government and the rule of law." Wright, Handbook of the Law of Federal Courts 209-210 (3d ed. 1976). *Compare Ex parte Young, supra; Fitzpatrick* v. *Bitzer, supra and Edelman* v. *Jordan,* 415 U.S. 651, 663-671 (1974).

The availability of prospective redress against state judges' infringement of constitutional rights is absolutely necessary to preserve the supremacy of federal constitutional and statutory law, and our constitutional form of

government. Without this redress, state judges could violate constitutional rights with impunity, thereby transforming those precious rights into mere hollow promises that none can enforce. This Court's decision in *Stump* v. *Sparkman,* 435 U.S. 349 (1978) established that judges are absolutely immune from damage actions even when they intentionally or wantonly violate constitutional rights.[9] To deprive individuals who suffer egregious infringement of their constitutional rights of declaratory and injunctive relief which protects those rights in the future would nullify the constraints imposed on state judges by the Constitution. It is a fundamental prerequisite to our constitutional form of government that, as this Court stated in *Butz* v. *Economou,* 438 U.S. 478,506 (1978), "individuals whatever their position in government are subject to federal law. 'No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity.' "

The importance of this rule of law in maintaining our constitutional form of government was made clear by this Court 100 years ago in *Ex parte Virginia,* 100 U.S. 339 (1880). There, the Supreme Court upheld the arrest and federal indictment of a state court judge pursuant to the predecessor statute to 42 U.S.C. § 1983, stating:

> [a] State acts by its legislative, its executive or its judicial authorities. It can act in no other way. The constitutional provision [Fourteenth Amendment], therefore, must mean that no

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[9]Judicial immunity has been characterized as "absolute" in that it bars all damage actions challenging a judge's conduct, unless the judge lacks jurisdiction over a matter. However, that characterization does not extend this immunity to equitable suits. *Compare Imbler* v. *Pachtman,* 424 U.S. 409 (1976) and *Ex parte Young,* 209 U.S. 123 (1908).

> agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. . . . This must be so, or the constitutional prohibition has no meaning.

Id. at 347. *See Ex parte Bradley,* 74 U.S. (7 Wall.) 364 (1868).[10]

The federal courts have refused to violate this fundamental precept of constitutional law by extending judicial immunity to declaratory or equitable actions, *Person* v. *Association of Bar of City of New York,* 554 F.2d 534, 537 (2d Cir.1977); *Fowler* v. *Alexander,* 478 F.2d 694 (4th Cir. 1973); *Erdmann* v. *Stevens,* 458 F.2d 1205, 1210 (2d Cir. 1972), *cert. denied,* 409 U.S. 889 (1972); *Littleton* v. *Berbling,* 468 F.2d 389 (7th Cir. 1972), *rev'd on other grounds sub nom. O'Shea* v. *Littleton,* 414 U.S. 488 (1974) *Jacobson* v. *Schaefer,* 441 F.2d 127, 130 (7th Cir. 1971); *United States* v. *McLeod,* 385 F.2d 734 (5th Cir. 1967); *Cassidy* v. *Ceci,* 320 F. Supp. 223 (E.D. Wisc. 1970); *Larsen* v. *Gallogly,* 361 F. Supp. 305 (D.R.I. 1973), *vacated as moot,* 420 U.S.C. 904 (1975); *Rakes* v. *Coleman,* 318 F. Supp. 818 (E.D. Va. 1970); *Conover* v. *Montemuro,* 304 F. Supp. 259 (E.D. Pa. 1969).[11]

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[10]See, *Cooper* v. *Aaron,* 358 U.S. 1, 18 (1958). ("No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it."); *Perez* v. *Ledesman,* 401 U.S. 82, 104-106 (1971) (Brennan, J. concurring).

[11]The lower courts are divided on whether equitable suits may be brought against state judges challenging discretionary judicial decisions rendered in cases or controversies where, as stated in *Gay* v. *Heller,* 252 F.2d 313, 315 (5th Cir. 1958), "[t]he normal way to correct errors in the trial or other disposition of a lawsuit is by appeal, not by suing the judge." *Compare: Littleton* v. *Berbling,* 468 F.2d 389 (7th Cir. 1972), *rev'd on other grounds sub nom. O'Shea* v. *Littleton,* 414 U.S. 488 (1974); *Stephen* v. *Drew,* 359 F.Supp. 746 (E.D. Va. 1973); *Wallace* v. *McDonald,* 369 F.Supp. 180, 188 (E.D.N.Y. 1973); *United States* v. *Clark,* 249 F.Supp. 720, 727 (S.D. Ala. 1965); *Bramlett* v. *Peterson,* 307 F.Supp. 1311, 1321 (M.D. Fla. 1969); *Phillips* v. *Cole,* 298 F.Supp. 1049 (N.D. Miss. 1968); *DeVita* v. *Sills,* 422 F.2d 1172 (3rd Cir. 1970); *Staud* v. *Stewart,* 366 F.Supp. 1398 (E.D. Pa. 1973), aff'd, 547 F.2d 1164 (3rd Cir. 1977); *Jacobson* v. *Schaefer,* 441 F.2d 127, 130 (7th Cir. 1971); *United States* v. *McLeod,* 385 F.2d 734 (5th Cir. 1967); *and* the cases cited in Brief on Behalf of the Appellants at 11, n.5.

In *Law Students Civil Rights Research Coun., Inc.* v. *Wadmond,* 299 F. Supp. 117 (S.D.N.Y. 1969), *rev'd on other grounds,* 401 U.S. 154 (1971) (Friendly, J.), a Three-Judge Court refused to apply such immunity to a suit seeking prospective relief from unconstitutional court rules, explaining that

> [w]e fail to perceive what interest would be served by holding federal courts to be powerless to enjoin state officers from acting under a state law that allegedly deprives

However, in these cases, comity and abstention, rather than judicial immunity, explain the federal courts' decision to deny review of the legality of judges' conduct. For example, in *Cheramie* v. *Tucker,* 493 F.2d 586 (5th Cir. 1974), the federal court refused to hear a claim that a state court had erred and misapplied state law, thereby depriving the plaintiff of a due process right. The *Cheramie* court acknowledged that injunctive actions could be maintained against judges, but nonetheless declined to intervene because the interpretation of state law is committed to the discretion of state judges. *Id.* at 588. This case should have been decided on comity, rather than judicial immunity grounds. Another example is *Gay* v. *Heller,* supra, in which the plaintiff failed to appeal a decision of a state circuit court judge, and then later attempted to attack that judgment collaterally by suing the judge. Judicial immunity was applied to prevent the plaintiff from circumventing state appellate procedures. Again, comity considerations better explain the court's decision. Where judges' attorney conduct rules on their face infringe on consumers' constitutional rights, federal judicial review of those rules does not interfere with state judges' authority to determine the meaning of state law or with state appellate procedures.

> citizens of rights protected by the Civil Rights Act or promulgating regulations that are alleged to have that result simply because some of them are robed.

Government officials who seek sweeping immunities from suit carry the burden of demonstrating that public policies necessitate such immunity. *Butz* v. *Economou, supra,* 438 U.S. at 506. Without question, the Virginia Court has not sustained its burden of showing that the traditional justifications for judicial immunity or that any public policies dictate depriving persons of prospective relief from judges' constitutional wrongs.

Judicial immunity was created at common law to protect judges from litigation that would interfere with the performance of judicial duties. As explained in *Butz* v. *Economou, supra,* 438 U.S. at 512,

> controversies sufficiently intense to erupt in litigation are not easily capped by a judicial decree. The loser in one forum will frequently seek another, charging the participants in the first with unconstitutional animus. Absolute immunity is thus necessary to assure that judges. . . can perform their respective functions without harrassment or intimidation.

Parties angered by a judge's decision might sue and attempt to impart malicious motives to the judge to recover damages from the judge personally. Judges' fear of lawsuits attacking their motives and of personal liabilities would deter independent decisionmaking. *Bradley* v. *Fischer,* 80 U.S. (13 Wall.) 335, 347 (1871). Thus, judicial immunity serves to safeguard the public's interest in an impartial and effective judiciary. However,

it is not intended to benefit personally those judges who disregard the law to the detriment of individuals and the public. *Pierson* v. *Ray,* 386 U.S. 547, 554 (1967).

In contrast to damage actions, lawsuits that seek a declaration that a court Rule is unconstitutional and an injunction against its enforcement do not deter desirable judicial behavior. These suits are not brought to avenge judicial decisionmaking or to impugn the integrity of judges; they do not threaten judges with personal liabilities; they bear no resemblance to the harrassing damage actions which could impair the viability of the judiciary. See *Bradley* v. *Fischer, supra,* 80 U.S. (13 Wall.) at 347.

Instead these suits are analogous to appeals in which a court with the power of review merely determines if the law has been correctly interpreted and applied by another Court. The possibility of such review should instill no greater fear in judges than the possibility of an appeal, which judges face on a regular basis with no impairment of their judicial functions. The Virginia Court's failure until now to claim judicial immunity in this suit and its total failure to claim it in another case that challenged its disciplinary rules, *Hirschkop* v. *Snead,* 594 F.2d 356 (4th Cir. 1979), very strongly suggest that these cases have not, in fact, interfered with the functioning of the Virginia Court.

Moreover, equitable suits will not be so numerous as to distract judges from their judicial obligations. In the ordinary case, unlike here, judicial errors can and will be corrected through appeals, rather than through suits against judges. The low number of declaratory and injunctive actions brought against judges in those circuits

which permit these actions attests to this fact.[12] Judges incur no costs to defend these few suits where, as here, they are represented by the state attorney general. They devote a nominal amount of time to the defense of these suits because most primarily involve issues of law. Frivolous suits can quickly be disposed of by firm application of the Federal Rules of Civil Procedure. *Butz* v. *Economou, supra,* 438 U.S. at 507-508. Therefore, judicial immunity from declaratory or injunctive actions is not required to enable judges to perform their responsibilities in an independent, but constitutional, fashion.[13]

Just as the judicial immunity accorded quasi-judicial officers is limited to damage actions, so too should the judicial immunity extended to judges for judicial acts be limited. Judicial immunity applies to prosecutors' quasi-judicial acts, such as the decision to prosecute, because of the similarity between those acts and the duties performed by judges. *Imbler* v. *Pachtman,* 424 U.S. 409, 422-429 (1976). Both prosecutors and judges render judgments that necessarily engender hostilities in parties and could elicit numerous retaliatory damage actions. Absolute judicial immunity from damage awards serves to protect both from lawsuits that would interfere with the independent and forceful performance of their public responsibilities. *Id.*

[12]Counsel to the consumer groups have discovered only those cases cited the briefs filed in this case and several other cases. *See* J.S. at 10, n.5; pp. 12-13, 19, 24-26, 32 n.29, *supra* & *infra.*

[13]Another historical reason for the judicial immunity doctrine, discussed in English common law cases, is that subjecting the judges to damage suits is unseemly. However, declaratory or equitable actions are no more unseemly than an appeal from a judge's decision. Both merely question the correctness of a judge's determination. Neither attempts to impose personal liabilities on judges.

Nonetheless, judicial immunity does not shield prosecutors from suits challenging their judicial acts when only declaratory and injunctive relief is sought. *Dombrowski* v. *Pfister,* 380 U.S. 479 (1965); *Ex parte Young, supra,* 123 U.S. at 159-160. Such equitable relief enables people to protect their rights, yet does not impair the ability of prosecutors to perform properly their prosecutorial responsibilities. Similarly, equitable suits against judges who infringe on constitutional rights safeguard constitutional guarantees without compromising the viability of the judiciary.[14]

B. 42 U.S.C. § 1983 Authorizes Suits Seeking Prospective Relief From State Court Judges' Unconstitutional Acts.

If judicial immunity were extended to suits seeking prospective relief, then Congress necessarily would have abolished such immunity from 42 U.S.C. § 1983 actions.

[14]Indeed, judicial immunity did not prevent the English Courts from enjoining lower court judges. 1 Holdsworth, a History of English Law 226-239 (7th ed. 1956) ("Holdsworth"). Amicus attorneys general mistakenly rely on *Heath* v. *Rydley,* 79 Eng. Rep. 286 (Cro. Jac. 1614) to establish that the English common law granted judges immunity from suits in equity. Brief Amicus Curiae of the State of South Carolina, et al., at 4. In *Heath,* a court of equity refused to enjoin the enforcement of a common law court's decision. In substance, although not in form, *Heath* was a suit against the common law judge for a declaration that the judge had acted contrary to law and an injunction against his judgment. However, *Heath* was not followed by other courts of equity, 1 Holdsworth, *supra* at 461 (citing *Courtney* v. *Granvil,* (1615) Cro. Jac. 343) and was overruled by order of King James I, on July 26, 1616. *Id.* at 463-465. That order explicitly authorized courts of equity to review and enjoin decisions of courts of common law. *Id.* Indeed, King James I applauded his decision and commented: "[a]s God contains the sea within his bounds and marches so is it my office to make every court contain himself within his own limits." *Id.* at 463 n.3.

1. Congress Has Authority to Abrogate Judicial Immunity From Declaratory and Injunctive Suits.

The Virginia Court argues that Congress cannot abrogate judicial immunity enjoyed by state judges because of the principles of separation of powers embodied in the "guarantee clause" of Article IV, Section 4 of the U.S. Constitution and the Tenth Amendment. Even if judicial immunity had a constitutional basis, which it does not,[15] Congress could abrogate that immunity under the Fourteenth Amendment.

[15]Judicial immunity has no constitutional basis, so that Congress may more easily abolish this immunity than immunities provided under the Constitution. Appellant's argument that the Tenth Amendment prevents Congress from abrogating judicial immunity was rejected by this court in *Monell* v.*Dept. of Soc. Serv. of City of N.Y.*, 436 U.S. 658, 690 n. 54 (1978). The Tenth Amendment merely reserves to the States and the people powers not granted to the federal government. However, as explained in *Ex parte Virginia, supra,* 100 U.S. at 346, "in exercising her rights, a State cannot disregard the limitation which the Federal Constitutional has applied to her power." Moreover, the Tenth Amendment does not prevent Congress from exercising the authorities specifically granted to it under the Fourteenth Amendment to enforce that Amendment against the States. *National League of Cities* v. *Usery,* 426 U.S. 833 (1976), the case relied on by the Virginia Court in making this argument, was correctly found by this Court in *Monell* to have no bearing on the scope of congressional authority under the Fourteenth Amendment. *Monell, supra* at 690, n. 54. The Virginia Court's claim that federal judicial review of the constitutionality of its actions will impair the independence of the state judiciary was rejected by this Court as early as *Martin* v. *Hunter,* 14 U.S. (1 Wheat.) 304 (1816) and again in *Cohens* v. *Virginia,* 19 U.S. (6 Wheat.) 264 (1821).

The separation of powers doctrine does not prevent Congress from granting federal courts jurisdiction over suits against state judges seeking prospective relief from unconstitutional acts. That doctrine is designed to preserve equality between the branches of government, not to grant superiority to a particular branch. To remove state judges from review in federal court would elevate state

That Amendment expressly empowers Congress to enforce its provisions against the states. *Monroe* v. *Pape,* 365 U.S. 167 (1961). The power to abrogate state governmental immunities from suits seeking prospective relief from unconstitutional state acts is inherent in that grant of authority. Thus, in *Fitzpatrick* v. *Bitzer, supra,* 427 U.S. at 455-456, this Court held that the Fourteenth Amendment, Section 5 enables Congress to abolish sovereign immunities enjoyed by the States under the Eleventh Amendment. Citing two suits brought against judges, *Ex parte Virginia, supra,* 100 U.S. at 346-348, and *Mitchum* v. *Foster,* 407 U.S. 225, 238-239 (1972), this Court in *Fitzpatrick* stated:

> There can be no doubt that this line of cases has sanctioned intrusions by Congress, acting under the Civil War Amendments, into the *judicial,* executive, and legislative spheres of autonomy previously reserved to the States.
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> * * * *

judges above all branches of government, even above the federal government, nullifying the Supremacy Clause. *Hampton* v. *City of Chicago Cook County, Illinois,* 484 F.2d 602, 607 (7th Cir. 1973) (Stevens, J.). Therefore, this doctrine does not apply to the federal judiciary's relationship to the states. *Elrod* v. *Burns,* 427 U.S. 347, 352 (1976).

Finally, the attributes of a republication form of government, guaranteed under Article 4, Section 4, are determined by Congress, the elected representative of the people. The Virginia Court's claim that Article 4, Section 4 guarantees state judges immunity from suits for prospective relief raises a non-justiciable question. *Baker* v. *Carr,* 369 U.S. 186, 218-225 (1962). In any case, judicial immunity cannot be an element of a republican form of government because many of the states, prior to the Supreme Court decision in *Bradley* v. *Fischer,* 80 U.S. (13 Wall.) 335 (1871), did not provide such immunity to state judges. *See Minor* v. *Happersett,* 88 U.S. (21 Wall.) 162, 175-176 (1875); Liability of Judicial Officers Under Section 1983, 79 Yale L.J. 322, 324 n. 13, 325-327 (1969).

> We think that Congress may, in determining what is "appropriate legislation' for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts.

427 U.S. at 455-456 (emphasis added). Therefore, Congress can abrogate judicial immunities to allow persons to bring suit to stop judicial infringement of their constitutional rights. *See Pierson* v. *Ray,* 386 U.S. 547 (1967).[16]

2. Congress Abrogated Judicial Immunity From Equitable Suits Brought Under 42 U.S.C. § 1983

The plain language of 42 U.S.C. § 1983 authorizes equitable suits against state judges who infringe on constitutional rights. The legislative history of 42 U.S.C. § 1983 establishes Congress' intent to authorize persons who suffer a deprivation of constitutional rights at the hands of state judges to obtain a declaration of their rights in federal court and an injunction against future violations.[17] In *Mitchum* v. *Foster, supra,* 407 U.S. at 240-242, (citation omitted), the Supreme Court concluded:

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[16]*See also Home Tel. & Tel. Co.* v. *Los Angeles,* 227 U.S. 278, 290 (1913) ("Congress by virtue of the fifth section of the Fourteenth Amendment, may enforce the prohibitions whenever they are disregarded by either the Legislative, the Executive, or the Judicial Department of the State. The mode of enforcement is left to its discretion"); *McCulloch* v. *Maryland,* 17 U.S. (4 Wheat.) 316, 420 (1819).

[17]Congress enacted §1983 to implement the Fourteenth Amendment. The consumer groups' First Amendment rights are guaranteed through the Fourteenth Amendment against action by Virginia. *Gitlow* v. *New York,* 268 U.S. 652 (1925).

> It is clear from the legislative debates surrounding the passage of Section 1983's predecessor that the Act was intended to enforce the provisions of the Fourteenth Amendment 'against State action, . . . whether that action be executive, legislative or judicial.' Proponents of the legislation noted that state courts were being used to harrass and injure individuals, either because the state courts were powerless to stop deprivations or were in league with those who were bent upon abrogation of federally protected rights.
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> * * * *
>
> The debate was not about whether the predecessor of § 1983 extended to actions of state courts, but whether this innovation was necessary or desirable.

The *Mitchum* court further held that § 1983 authorized federal courts to issue injunctions to stay state court proceedings to prevent the loss of constitutional rights:

> The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights — to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative or judicial.' In carrying out that purpose, Congress plainly authorized the federal courts to issue injunctions in § 1983 actions, by expressly authorizing a 'suit in equity' as one of the means of redress.

Id. at 242 (citation omitted).

The facts in *Mitchum* bear a striking resemblance to this case. That suit was brought against a number of

state officials, including a state court judge. Plaintiffs sought to obtain a declaration that the judge's preliminary order infringed on constitutional rights and an injunction staying proceedings then pending before the judge. The judge did not claim judicial immunity. Without discussing if judicial immunity applied, the Supreme Court held that 42 U.S.C. § 1983 authorized the declaratory and injunctive relief requested.[18]

In another suit brought against a judge, *Law Students Civil Rights Research Coun., Inc.* v. *Wadmond, supra,* 299 F.Supp. at 124, a Three-Judge District Court held that judicial immunity does not bar equitable suits brought under § 1983. Writing for the Court, Judge Friendly concluded that "[t]o hold otherwise would be to leave without a remedy a significant class of the deprivations of federal rights under color of law that Congress intended federal courts to redress under 42 U.S.C. § 1983 and 28 U.S.C. § 1343." *Id.* at 124. *Accord Person* v. *Association of Bar of City of New York, supra,* 554 F.2d at 537.

[18]Indeed, the very existence of the anti-injunction statute suggests congressional intent that judicial immunity not prevent federal district courts from examining the constitutionality of state judges' actions. Otherwise, that statute would be unnecessary.

Pierson v. *Ray,* 386 U.S. 547 (1967) and *Stump* v. *Sparkman,* 435 U.S. 349 (1978), are not controlling here. These cases held that Section 1983 did not abolish judicial immunity from damage suits because the legislative history of the Act did not specifically provide for such suits. In contrast, Congress did express intent to permit individuals to protect their constitutional rights from infringement by state judges by obtaining a declaration of those rights in federal court and injunctive relief to protect those rights from future infringement. *Mitchum* v. *Foster, supra,* 407 U.S. at 240-242.

C. Judicial Immunity Does Not Apply to the Virginia Court's Administrative Act of Promulgating Disciplinary Rules

Even if judicial immunity were to apply to declaratory and equitable suits brought under § 1983, that immunity does not attach to the Virginia Court's administrative act of regulating attorney participation in consumer directories, but applies only to its "judicial acts." As explained in *Butz* v. *Economou, supra,* 438 U.S. at 511, judges' immunity arises "not because of their particular locations within the Government, but because of the special nature of their responsibilities." When judges resolve cases or controversies by applying existing law, they engage in judicial acts. *Stump* v. *Sparkman,* 435 U.S. 349 (1978).[19] However, when judges issue general rules to regulate the future conduct of the entire legal profession in the State, they perform an administrative rulemaking function.[20]

[19]The definition of "judicial act" set forth in *Stump* v. *Sparkman, supra,* 435 U.S. at 362, assumes the existence of a case or controversy involving "parties":

> The relevant cases demonstrate that the factors determining whether an act by a judge is a 'judicial' one relate to the nature of the act itself . . . to the expectations of the parties, i.e., whether they dealt with the judge in his judicial capacity.

[20]Judicial immunity was never applied in common law cases to judges' non-judicial actions. In early English law, prior to the development of appeals procedures, unsuccessful litigants obtained review of lower court decisions by suing the lower court judge in a higher court. 1 Holdsworth, A History of English Law 213, 214, 215 (7 ed. 1956) ("Holdsworth"); Quasi-Judicial Immunity: Its Scope and Limitations in Section 1983 Actions, 1976 Duke L.J. 95, 112 n.95. With the advent of appellate procedures, review of the correctness of a judge's decision was obtained through appeals. Judicial immunity was then developed to protect judges from damages actions challenging those decisions, *Id.* 6 Holdsworth, *supra*

The Code of Virginia, § 54-48, authorizes the Virginia Court to "prescribe, adopt, promulgate and amend rules and regulations . . . [p]rescribing a code of ethics governing the professional conduct of attorneys-at-law. . . ." These authorizations are akin to those granted in the very same title of the Code by the Virginia Legislature to state agencies and by Congress to federal administrative agencies responsible for regulating various industries. Just as Virginia administrative agencies issue ethical rules governing the conduct of doctors, nurses, architects and numerous other professions,[21] so does the Virginia Court issue rules and regulations controlling the conduct of attorneys.

In *Lathrop* v. *Donohue,* 367 U.S. 820, 827 (1961), the Supreme Court held that a Rule promulgated by the Wisconsin Supreme Court to integrate the Wisconsin Bar was not a judicial act:

> Integration of the Bar of Wisconsin bore no resemblance to adjudication. The State Supreme Court's action disposed of no litigation between parties. Rather, the court sought to regulate the profession by applying its orders to all present members of the Bar and to all persons coming within the described class in the future.[22]

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at 234-235 (2d ed. 1937), *Floyd* v. *Barker,* 77 Eng. Rep. 1305 (K.B., 1607), but not to judges' administrative actions. Thus for example, in *Attwood* v. *Chapman,* [1914] 3 K.B. 283-286, the Court held that judicial immunity did not apply to judges who were not sitting as a "Court in law" deciding cases, but instead were granting licenses. See *Purcell* v. *Sowler,* [1877] 2 C.P.D. 215 (Mellish, L.J. concurring).

[21]Code of Virginia, Title 54.

[22]The issue before the *Lathrop* Court was whether the Wisconsin Supreme Court's rule was a "statute" for purposes of 28 U.S.C. §1257(2), so that the Supreme Court could hear an appeal from a

The Supreme Court and lower federal courts many times have found judges' regulatory acts to be administrative. See *Keller* v. *Potomac Elec. Co.,* 261 U.S. 428 (1923) (Supreme Court of District of Columbia's involvement in rate setting was not a judicial act); *Public Service Co. of Northern Illinois* v. *Corboy,* 250 U.S. 153, 161-162 (1919) (circuit court which regulated establishment of drainage districts acted in an executive, not a judicial, capacity); *Prentis* v. *Atlantic Coast Line,* 211 U.S. 210 (1908) (Virginia commission's setting of railway passenger rates is not a judicial act); *Ex parte Rowland,* 104 U.S. 604, 613 (1881) (probate judge who regulated affairs of county, pursuant to statutory authorization, performed an administrative, not a judicial, function); *Ktsanes* v. *Underwood,* 552 F.2d 740, 743 (1977) (Illinois Supreme Court's refusal to create an exemption to its rules controlling admission to the Illinois bar was an administrative not a judicial act); *Lynch* v. *Johnson,* 420 F.2d 818 (6th Cir. 1970), *cited in Stump* v. *Sparkman, supra,* 435 U.S. at 361 n.10. (county court's regulation of affairs of county was an administrative not a judicial act); *Law Students Civil Rights Research Coun., Inc.* v. *Wadmond, supra,* 299 F. Supp. at 127. *See also Ex parte Virginia, supra,* 100 U.S. at 348 (selecting jurors is a ministerial, not a judicial act); *Roudebush* v. *Hartke,* 405 U.S. 15 (1972) (granting of recount petitions after election and appointment of commissioner to oversee recount is a ministerial or administrative, but

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Wisconsin Supreme Court decision upholding the validity of that rule. The term "statute" had been broadly defined under §1257(2) to include any provision which has the force of law in a state, including administrative regulations. The *Lathrop* Court noted that the rule was legislative in character in that it had the effect of law in Wisconsin. However, it did not suggest that legislative immunity would apply to this administrative action.

not a judicial, act); *United States* v. *Ferreira,* 54 U.S. (13 Howard) 39 (1851) (procedures followed by judges to receive and adjust war claims are not judicial).[23]

Because the issuance of rules is administrative, the protections afforded individuals against unconstitutional judicial conduct are absent.[24] Foremost, the right of appeal, which has been cited as justification for this immunity, is non-existent.[25] In *Pierson* v. *Ray, supra,* 386, U.S. at 554, the court upheld judicial immunity from a damage action because "[a judge's] errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption."[26] However, no appeal

[23]Several of those decisions refer to the regulatory activities of courts as legislative rather than judicial in character only in order to justify judicial review of the activities, e.g., *Prentis* v. *Atlantic Coast Line, supra.* The decisions correctly do not apply legislative immunity which would preclude judicial review of these administrative actions. Although "[l]egislative or substantive regulations are 'issued by an agency pursuant to statutory authority,' " agency decisionmakers do not enjoy legislative immunity from suits challenging the constitutionality of the regulations and seeking an injunction against their enforcement. *See Batterton* v. *Francis,* 432 U.S. 416, 425 n.9 (1976); *Ex parte Young,* 209 U.S. 123 (1908).

[24]Also, because an administrative act is at issue, the purposes underlying judicial immunity do not apply. Judicial review of the constitutionality of a court rule is identical to appellate review of judicial decisions and will not compromise judicial independence. See pp. 14-17, *supra.*

[25]Kates, Jr., Immunity of State Judges under the Federal Civil Rights Acts: Pierson v. Ray Reconsidered, 65 Nw. U.L. Rev. 615, 629 n.43 (1970); Note, Liability of Judicial Officers Under Section 1983, 79 Yale L.J. 322, 330 (1969); Jennings, Tort Liability of Administrative Officers, 21 Minn. L. Rev. 263, 272 (1937).

[26]Following *Pierson,* the Court of Appeals for the Fifth Circuit noted:

> [W]e too are mortified by the spectre of deprivations of the civil rights of our citizenry. But when the infringement comes at the hands of a judge, our system offers its own built-in corrective — the improprieties of judges may be attacked and *appealed from,* either directly or collaterally.

McAlester v. *Brown,* 469 F.2d 1280, 1283 (5th Cir. 1972) (emphasis added).

procedures were available to the consumer groups to correct the Virginia Court's unconstitutional Rule. To apply judicial immunity where no right to appeal exists would be a grave misapplication of that doctrine, eliminating the sole remedy for a constitutional wrong.

Other public protections that reduce the likelihood of unconstitutional judicial acts also do not accrue to administrative functions. Judges who act in a judicial capacity are bound by precedent; the Virginia Court when it issues regulations controlling the legal profession is not. Judges respond to adversarial proceedings open to the public, in which all views are fully presented; the Virginia Court issues regulations in response to a petition from the Virginia Bar, without any adversarial hearings in which conflicting views may be aired. *Butz* v. *Economou, supra,* 438 U.S. at 512. The absence of these basic public protections against the adoption and enforcement of the unconstitutional Rule militates against expanding judicial immunity to encompass administrative acts.

D. Judicial Immunity Does Not Prevent the District Court From Enjoining the Virginia Court's Prosecutorial, Quasi-Judicial Acts.

The Virginia Court's enforcement of the Rule is similar to the responsibilities performed by prosecutors and is quasi-judicial rather than judicial in nature. *Im-*

bler v. *Pachtman,* 424 U.S. 409 (1976). The Virginia Court can bring disciplinary proceedings against attorneys on its own initiative, without the involvement of the Bar. *Legal Club* v. *Light,* 137 Va. 249 (1923). Indeed, the Supreme Court long has recognized the inherent authority of the courts to discipline attorneys.

> We do not doubt the power of the court to punish attorneys as officers of the same, for misbehavior in the practice of the profession. This power had been recognized and enforced ever since the organization of courts, and the admission of attorneys to practice therein.

Ex parte Bradley, 74 U.S. (7 Wall.) 364, 374 (1869).

Also, under the Virginia Code, § 54-74, complaints against attorneys who violate disciplinary rules can be filed directly with any court of record, including the Supreme Court of Virginia, without ever proceeding through the Bar. *Defoe* v. *Friedlander,* 211 Va. 121 (1970). Whenever a complaint is filed, the Virginia Court can initiate prosecutions by certifying an order against attorneys to show cause why their licenses to practice should not be revoked or suspended and by appointing two judges to sit with the original judge to rule on the complaint, Va. Code, § 54-74(2).

Such prosecutorial activities are not shielded by judicial immunity from suits seeking equitable relief. The Supreme Court's 1908 decision in *Ex parte Young,* 209 U.S. 123, 159-160 (1908) established the right to sue to enjoin prosecutions that infringe on constitutional rights. In the case most analogous to the case now before this court, *Dombrowski* v. *Pfister,* 380 U.S. 479 (1965), the Supreme Court found proper an injunction which prohibited prosecutions under a statute that infringed on freedoms of expression. In *Dombrowski,* as in this case, an injunction against all enforcement of the unconstitutional law was required to preserve First Amendment rights. Judicial immunity does not bar such relief.

E. Legislative Immunity Does Not Apply to the Rulemaking or Enforcement Activities of the Virginia Court.

Similarly, legislative immunity does not extend to the Virginia Court's administrative and prosecutorial acts. *Hutchinson* v. *Proxmire,* 99 S. Ct. 2675 (1979); *Doe* v. *McMillan,* 412 U.S. 306 (1973). Contrary to assertions of the Virginia Court, the federal immunity accorded state legislators does not derive from the Speech and Debate Clause of the U.S. Constitution or from State law. Its source is the federal common law. *Lake County Estates, Inc.* v. *Tahoe Regional Planning Agency,* 440 U.S. 391, 404 (1979); *Tenny* v. *Brandhove,* 341 U.S. 367 (1951); *Hampton* v. *City of Chicago, Cook County, Illinois,* 484 F.2d 602, 608 (7th Cir. 1973) (Stevens, J.).

This immunity is derived from the immunity created in England to protect members of Parliament from the efforts of the Crown to quash speeches that displeased the King. *United States* v. *Johnson,* 383 U.S. 169, 178 (1966). It was adopted in the United States not to benefit legislators but "to support the rights of the people by enabling their representatives to execute the functions of their office without fear of prosecution, civil or criminal." *Tenny* v. *Brandhove, supra,* 341 U.S. at 373-374 (quoting with approval *Coffin* v. *Coffin,* 4 Mass. 1, 28 (1808)); *United States* v. *Johnson, supra,* 383 U.S. at 180-181. Legislative immunity applies only to the extent required to prevent the executive and

judicial branches from interfering directly or indirectly with powers reserved to the legislative branch. *United States* v. *Brewster,* 408 U.S. 501, 517 (1972).[27]

To extend legislative immunity to this case would insulate an enormous number of State and federal administrative officers from suits for declaratory and injunctive relief from their constitutional wrongs. *Eastland* v. *United States Servicemen's Fund,* 421 U.S. 491 (1975). Such an application of legislative immunity would be totally at odds with the well-established doctrine that the people can defend their constitutional rights from infringement by administrative officials by bringing suits for declaratory and injunctive relief. *Ex parte Young,* 209 U.S. 123 (1908).

Moreover, the administrative functions of the Court are entirely different in nature than the law-making ac-

[27]Thus, this Court's decision in *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency,* 440 U.S. 391 (1979) does not apply here. That decision involved an interstate body, formed by an interstate compact approved by the Congress, that controlled the development of the entire Lake Tahoe region. As explained by the Ninth Circuit in that case, "such [interstate] compacts, by their nature, establish regional legislatures." *Jacobsen* v. *Tahoe Regional Planning Agency,* 566 F.2d 1353, 1365 (9th Cir. 1977). Because the interstate body possessed authorities that neither state legislature could perform independently or control independently, the body acted as an interstate legislature. *Id.* In contrast, here, the Virginia Court is exercizing delegated authorities indentical to those possessed by state administrative agencies which do not enjoy legislative immunity.

Moreover, the Ninth Circuit held that prospective declaratory and injunctive relief could be granted against the interstate body. 566 F.2d at 1360 & 1366. That decision was not reversed by the Supreme Court. 440 U.S. at 391. Thus, legislative immunity does not bar prospective relief from the Virginia Court's enforcement of its unconstitutional Rule.

tivities of Congress. While Congress, before passing legislation, holds hearings at which representatives of diverse interests can express their views; the Virginia Court responds only to a petition from the Bar in issuing and amending its Rules. Legislators debate proposed legislation on the floors of the House and Senate before the public view; however, the Virginia Court makes its decisions on rules in secret. Congress passes laws, but does not enforce them; the Virginia Court both issues and enforces its rules. Because the Virginia Court's administrative authorities bear so little resemblence to the legislative activities of Congress, legislative immunity should not be expanded to encompass the actions at issue in this case. See *Gravel* v. *United States,* 408 U.S. 606, 622 (1972).

None of the purposes for legislative immunity even apply here. Immunizing the Virginia Court from suit would not preserve the separation of powers assigned to the legislative branch. This case creates no conflict between the legislative and judicial branches of government. *Baker* v. *Carr,* 369 U.S. 186, 210-211 (1962). Instead, the relationship between a state and a federal court is at issue. As stated in *Elrod* v. *Burns,* 427 U.S. 347, 352 (1976), "the separation-of-powers principle. . . has no applicability to the federal judiciary's relationship to the States."[28]

To extend legislative immunity to the Virginia Court would not safeguard the public's right to unfettered representation but, instead, would leave the people defenseless against infringement of constitutional rights

[28]To hold otherwise would preclude federal judicial review of the constitutionality of state official's conduct and destroy the supremacy of federal constitutional and statutory law.

by appointed officials. The Virginia Court judges are not elected "representatives of the People." They are appointed officials with no direct accountability to Virginia citizens. Virginia Constitution, art. VI, §§ 2 & 7. The brake on legislators' misconduct provided by the electoral process would not protect Virginia citizens from infringement of their rights by the Virginia Court. *Tenny* v. *Brandhove,* supra, 341 U.S. at 378 ("[s]elf discipline and the voters must be the ultimate reliance for discouraging or correcting such abuses.")

Finally, this suit does not threaten, directly or indirectly, legislators' freedom to speak or debate. It does not even attempt to impinge on speeches or debates of the Virginia Court. Instead, the consumer groups merely seek judicial review of the constitutionality of a Court Rule. Legislative immunity has never barred judicial review of administrative rules. Absolutely no reason whatsoever exists for extending the doctrine here.

Thus, because the common law doctrine of legislative immunity does not encompass administrative functions performed by judges and because the purposes of that doctrine do not apply to this case, legislative immunity should not, as the Virginia Court asks, be expanded to protect its unconstitutional administrative acts.[29]

[29]The Virginia Court also seeks to avoid judicial review of its conduct by belatedly arguing that it is not a proper party to this case because a declaration of its Rule invalidity and an injunction enjoining all enforcement of the Rule does not invoke or require any judgment against it. However, it failed to raise this argument in the District Court and in its Jurisdictional Statement, so that the question is not now properly before this Court. *Phillips Chemical Co.* v. *Dumas Ind. Sch. Dist.*, 361 U.S. 376, 386 n.12 (1960);

II. THE CONSUMER GROUPS ARE ENTITLED TO THE AWARD GRANTED UNDER 42 U.S.C. § 1988 FROM STATE FUNDS.

The fee and cost award now before this Court is in all essential respects identical to the award upheld by this Court last term in *Hutto* v. *Finney,* 437 U.S. 678

Duignan v. *United States,* 274 U.S. 195, 200 (1927), *Helvering* v. *Wood,* 309 U.S. 344, 348-349 (1940).

Moreover, this argument is totally at odds with the Federal Rules of Civil Procedure and the facts in this case. F.R.C.P., Rule 20 permits plaintiffs to join as defendants any persons against whom they assert a right to relief arising from the same occurrences and involving common questions of law or fact. Joinder of parties with any interest in a dispute is strongly encouraged by the Rule. *United Mine Workers* v. *Gibbs,* 383 U.S. 715 (1966). Because the consumer groups sought a declaration that the Virginia Court and the Bar had jointly infringed on the groups', and their members' First Amendment rights and an injunction enjoining both defendants from disciplining attorneys for participating in the directory, the Virginia Court was properly joined as a defendant under Rule 20.

Amicus Conference of Chief Justices erroneously claims that just as legislators are not proper or necessary parties to suits challenging legislation, so too are judges improper parties to suits challenging their rules. Brief Amicus Curiae on Behalf of the Conference of Chief Justices In Support of the Jurisdictional Statement at 9. However, it is the legislative immunity doctrine, and not Rule 20, which prevents suits against legislators. There is no reason, legislative immunity aside, why legislators would not be a proper party to suits seeking prospective relief from their unconstitutional conduct.

Indeed, the Virginia Court arguably was an indispensable party under Rule 19, F.R.C.P. because its joinder was required to provide the consumer groups with complete relief from the unconstitutional Rule. Only by obtaining an injunction against all enforcement of the Rule could the consumer groups assure full participation in the directory by attorneys and overcome the chill cast on their constitutional rights by the Rule. See n.7, *supra. Ricci* v. *State Board of Law Examiners,* 569 F.2d 782, 784 (3rd Cir. 1978) (Pennsylvania Supreme Court held indispensable party to suit challenging its rules governing admission to Pennsylvania bar.);

(1978).[30] Both awards were assessed against state officials, in their official capacity, to be paid with state funds.[31] The Virginia Court's argument that judicial immunity bars the District Court from making this award is contrary to the plain language and strong legislative history of the Civil Rights Attorney's Fees Award Act of

Hirschkop v. *Snead, supra,* 594 F.2d at 363 n.4 (Virginia Supreme Court judges were proper party to suit challenging their attorney disciplinary rules). *Hackin* v. *Lockwood,* 361 F.2d 499 (9th Cir. 1966) (Arizona Supreme Court held an indispensable party to suit challenging its rules); *Murphy* v. *State Bd. of Law Exam. for Com. for Pa.,* 429 F.Supp. 16 (E.D. Pa. 1977) (Pennsylvania Supreme Court held indispensable party to suit challenging its rules). *But compare Law Students Civil Rights Research Council, Inc.* v. *Wadmond, supra,* at 299 F.Supp. at 124 (Amicus Conference of Chief Justices erroneously relies on this decision to argue that the Virginia Court is an improper party. However, the *Wadmond* Court merely held a N.Y. Court not to be an *indispensable* party to a suit challenging its rules; it never suggested that the N.Y. Court was in *improper* party under Rule 20.)

In any case, the consumer groups need only demonstrate that the Virginia Court was a proper, rather than an indispensable party, to prevail.

[30]The District Court has not determined the amount of the fee award to be paid by the Virginia Court. That award could be as much as the $103,707.88 requested by the consumer groups, or less than the $21,017.51 the Virginia Court first claimed to be appropriate, but later rejected as possibly too high. Defendants Response to Motion for Attorney's Fees (July 9, 1979); Defendants Supplemental Memorandum on Attorneys' Fees (July 13, 1979); Plaintiffs' Reply to Defendants' Supplemental Memorandum and to Defendants' Response to Motion for Attorneys' Fees.

[31]The Virginia Court concedes this award will be paid from state funds. Brief on Behalf of Defendants at 5 (June 5, 1978). The award granted in this case places no greater burden on state funds than envisioned by Congress. As stated in the House Report, "[t]he greater resources available to governments provide an ample base from which fees can be awarded to the prevailing plaintiff in suits against governmental officials or entities." H.R. Rep. No. 1558, 94th Cong., 2d Sess. 7 (1976).

1976, 42 U.S.C § 1988 ("Act"). Wherever state governmental immunities do not bar the underlying action, those immunities do not prevent an award under the Act from state funds.

As this Court observed in *Hutto,* "[t]he Act itself could not be broader. It applies to 'any' action brought to enforce certain civil rights laws. It contains no hint of exception for States defending injunction actions . . . The legislative history is equally plain." *Id.* at 694. The legislative history is replete with unequivocal statements of congressional intent to eliminate all government immunities that might preclude a fee award from state funds:

> [D]efendants in these cases are often State or local bodies or State or local officials. In such cases it is intended that the attorneys' fees, like other items of costs, will be collected either from the official in his official capacity, from funds of his agency or under his control, or from the State or local government (whether or not the agency or government is a named party).

S. Rep. No. 94-1011, 94th Cong., 2d Sess. 6 (1976) (hereafter "Senate Report"). *See also* H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. 7 (1976) (hereafter "House Report").

Judicial immunity was among the immunities Congress expressly abolished. The House Report[32] finds fee

[32]Amicus Conference of Chief Justices suggests that the House Report should not be used to determine Congressional intent because the Senate Bill, rather than the House version, became law. Brief Amicus Curiae on Behalf of the Conference of Chief Justices in Support of the Jurisdictional Statement at 14. However, the only difference between the two versions was the list of statutes under

awards against judges to be particularly important because judicial immunity limits the availability of reimbursement for damages:

> [I]n some cases, immunity doctrines and special defenses, available only to public officials, preclude or severely limit the damage remedy. [citing *Pierson* v. *Ray, supra,* a judicial immunity case]. Consequently awarding counsel fees to prevailing plaintiffs in such litigation is particularly important and necessary if Federal civil and constitutional rights are to be adequately protected.

House Report, *supra* at 9. Immediately thereafter, the House Report provides for fee awards in actions brought against state judges for injunctive relief:

> To be sure, in a large number of cases brought under the provisions covered by H.R. 15460, only injunctive relief is sought, and prevailing plaintiffs should ordinarily recover their counsel fees.

Id. See, Senate Report, *supra* at 5.

Congress further characterized the fee awards made under the Act as ancillary to injunctive relief so that government immunities would not bar such awards. Prior to this Court's decision in *Hutto,* the lower courts were divided on whether fee awards were more analogous to

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which fees could be awarded. Both provided for the recovery of fees and costs in suits brought under 42 U.S.C. § 1983. And both used identical language to authorize courts to award fees ("the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.") Thus, the House's statement that this language abolishes judicial immunity is a relevant expression of Congressional intent.

damage awards which could not be granted against state funds, *Edelman* v. *Jordan,* 415 U.S. 651 (1974), or costs incidental to injunctive relief, which could be assessed from state funds, *Fitzpatrick* v. *Bitzer,* 427 U.S. 445 (1976). *Compare Thonen* v. *Jenkins,* 517 F.2d 3, 7 (4th Cir. 1975) and *Skenan* v. *Board of Trustees of Bloomsburg State College,* 436 F. Supp. 657 (M.D. Pa. 1977).

Therefore, both the House and Senate Reports describe these fee awards as a necessary and incidental cost of obtaining injunctive relief vindicating constitutional rights. Senate Report, *supra* at 5-6; House Report, *supra* at 1. Congress also authorizes fees "as part of the costs" which traditionally have been awarded against the States. Thus, in *Hutto,* this Court held:

> We see no reason to distinguish this [attorney fee] award from any other penalty imposed to enforce a prospective injunction. Hence the substantive protections of the Eleventh Amendment do not prevent an award of attorney's fees against the Department's officers in their official capacities.

437 U.S. at 691-692 (footnote omitted).

Congress deemed the shifting of fees to the States as essential to protect constitutional rights from infringement by state officials:

> We find that the effects of such fee awards are ancillary and incident to securing compliance with these laws, and that fee awards are an integral party of the remedies necessary to obtain such compliance.
>
> * * * *

> If our civil rights laws are not to become mere hollow pronouncements which the average citizen cannot enforce, we must maintain the traditionally effective remedy of fee shifting in these cases.

Senate Report *supra* at 5 & 6. *See* House Report, *supra* at 1.

This, therefore, is precisely the kind of case in which Congress intended to shift litigation fees and costs to the States. The consumer groups were forced to assume their litigation expenses to protect significant constitutional rights of importance to the public from continued infringement by state officials. Reimbursement will prevent those rights from becoming mere "hollow pronouncements."[33]

[33]The Virginia Court's reliance on *Tenny* v. *Brandhove,* 341 U. S. 367 (1951) to establish that judicial immunity defeats § 1988 awards is misplaced. In that case, the Court held that legislative immunity barred plaintiff from bringing suit altogether under 42 U.S. C. § 1983. This immunity was retained because Congress expressed no intent to abolish legislative immunity from suit. In contrast, here, under 42 U.S.C. § 1988, the court is deciding only whether fees may be awarded to parties who can bring suit against state defendants and prevail. Because those fees are ancillary to injunctive relief properly granted against a state official, those fees may be awarded. *Hutto* v. *Finney, supra,* 437 U.S. at 691-692. And because Congress explicitly stated that no governmental immunities would prevent fee awards under the Act, the award should be upheld. *See* pp. 35-36 *supra.*

III. THE DISTRICT COURT ACTED WELL WITHIN ITS DISCRETION IN AWARDING FEES AGAINST THE VIRGINIA COURT.

Under 42 U.S.C. § 1988, "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." Because prevailing parties act as private attorneys general vindicating important constitutional rights, they are entitled to an award under § 1988 unless special circumstances would render an award manifestly unjust. Senate Report, *supra* at 4 and House Report, *supra* at 9 (citing *Newman* v. *Piggie Park Enterprise,* 390 U.S. 400, 402 (1968)). The District Court correctly found no special circumstances to exist in this case and awarded fees and costs against the Virginia Court.

The Virginia Court does not contest that finding or offer a single fact that establishes special circumstances. Instead, without any basis, it claims that the award was intended to penalize it for failing to amend its Rule after *Bates* and that judicial immunity bars punitive awards. However, the District Court's intentions are neither established in fact nor relevant to the proprierty of the fee award.[34] A court has discretion to award fees to prevailing parties from State funds under the Act, if the award is just, regardless of the court's intent. A party cannot defeat a just award by seeking to divine the subjective, unexplicit intentions of the Court granting the award.

Similarly, the Virginia Court's claim that it failed to amend its Rule, in good faith, has no bearing on the

[34]The District Court followed this Court's decision in *Hutto* v. *Finney, supra,* 437 U.S. at 699, n. 32, that good faith is not a defense and found the Virginia Court's assertions that it acted in good faith not to create special circumstances. J.S. at App. 5.

propriety of the fee award. Good faith is not a defense to awards granted under the Act.[35] Among the governmental immunities Congress abrogated in passing § 1988 was good faith immunity. The House Report, *supra,* at 9, notes that "in some cases, immunity doctrines and special defenses, available only to public officials, preclude or severely limit the damage remedy," citing *Wood* v. *Strickland,* 420 U.S. 308 (1975) and *Scheuer* v. *Rhodes,* 416 U.S. 232 (1974), two cases upholding good faith immunity in damage actions. The Report then concludes that "[c]onsequently awarding counsel fees to prevailing plaintiffs in such litigation is particularly important and necessary if Federal civil and constitutional rights are to be adequately protected."[36] *See also* Senate Report, *supra* at 5-6.

Therefore, this Court held in *Hutto* v. *Finney* that "[t]he Act authorizes an attorney's fee award even though the appeal was not taken in bad faith; no one denies that." 437 U.S. at 699, n. 32. *Accord, Brown* v.

[35]The District Court, did hold a fee award against the Bar to be unjust because one year after this suit was brought, the Bar proposed an amendment to the Rule, which it lacked legal authority to promulgate. One effect of the District Court's decision was that the fee and cost award will be paid from state funds, rather than by members of the Bar. The consumer groups contend that this holding was erroneous because the Bar was integrally involved in the infringement of appellants' and their members' constitutional rights prior to and after the initiation of this lawsuit, and because good faith is no defense under the Act. Their cross appeal on this issue is still pending before this court. *See* Jurisdictional Statement in *Consumers Union* v. *Virginia State Bar,* No. 79-185 at 8-10. Whatever the merits of that holding, the District Court correctly concluded that no such special circumstances existed with respect to the Virginia Court.

[36]The Virginia Court even concedes that this language "allow[s] fees for those acts answerable to suit under so-called "good faith immunity." Brief of Behalf of Appellants at 14, n. 8.

Culpepper, 559 F.2d 275, 278 (1977) ("In Title II and Title VI cases, the Fifth Circuit has held that the defendant's conduct, be it negligent or intentional, in good faith or bad, is irrelevant to an award of attorney's fees. We now hold that, consistent with congressional intent, the same standard should apply to § 1988."); *Henderson* v. *Forth Worth Independent School District,* 574 F.2d 1210, 1214 (5th Cir. 1978); *Population Services Intern.* v. *Carey,* 476 F.Supp. 4,7 (S.D.N.Y. 1979); *Lackey* v. *Bowling,* 476 F.Supp. 1111, 1115 (N.D. Ill. 1979) ("We do not dispute defendants' good faith. On the contrary, we commend defendants for changing the challenged policy immediately. . . . But a finding of good faith does not preclude the award of attorneys' fees.") Thus, even if the Virginia Court, in good faith, had failed to amend its Rule to conform to this Court's decision in *Bigelow* v. *Virginia, supra,* 421 U.S. 809 (1975), *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748 (1976), and *Bates* v. *State Bar of Arizona,* 433 U.S. 350 (1977), such good faith would not bar the award.[37]

[37]Moreover, the Virginia Court did not act in good faith. The Court argues that it was under no obligation to amend its Rule after *Bates* because the Attorney General of Virginia had issued an opinion stating that the Virginia Rule would not be enforced except to the extent that enforcement was allowed under *Bates,* and because the Virginia Court was only enforcing the Rule to that extent.

However, knowing that the consumer groups wanted to publish their directory, and knowing that the reach of the *Bates* decision was unclear, the Virginia Court had an obligation to amend their Rule to clarify what communications it permitted. The Virginia Court's claim that it was enforcing the Rule only to the extent allowed by *Bates* did not remove the chill its Rule had cast on attorneys' and consumers' First Amendment rights. No one knew to what extent that Rule was being, or would be enforced. The Attorney General's vague opinion provided little guidance on the parameters of acceptable speech:

Furthermore, even if the Court had amended its Rule immediately after *Bates,* this would not have rendered unjust the award granted in this case. Parties who prevail at any time during litigation are entitled to reimbursement under the Act. The House Report, *supra* at 7 states:

> Similarly, after a complaint is filed, a defendant might voluntarily cease the unlawful practice. A court should still award fees even though it might conclude, as a matter of equity, that no formal relief, such as an injunction, is necessary.

See Donaldson v. *O'Connor,* 454 F. Supp. 311 (N.D. Fla. 1978); *N.A.A.C.P.* v. *Bell,* 448 F. Supp. 1164

> To the extent, then, that DR-2-101 and DR-2-102. . . impose unreasonable time, manner and place limitations on attorney advertising; or . . . otherwise prohibit advertising which results in greater public benefit than harm, the rules are unenforceable under the First Amendment.

The Virginia Court's extraordinary delay in amending its Rule for more than two years after *Bates* was entirely unjustified. Both the American Bar Association and the vast majority of States responded far more promptly. The Virginia Court focuses on the six states which acted more slowly. Brief on Behalf of Appellants at 20. More instructive is consideration of those which acted more quickly. Within two months after the *Bates* decision, the American Bar Association amended its advertising rules. Within another four months, at least twelve states had responded to *Bates* by adopting new advertising codes. Within one year after *Bates,* at least thirty-four states had amended their advertising codes to provide for attorney advertising. American Bar Association, Regulation of Advertising by Lawyers; Comparisons of American Bar Association Model Code Of Professional Responsibility ABA Proposal B and State Codes (December 1978). Yet, the Virginia Court took over twenty-six months to adopt a very simple code that provides "[a] lawyer or law firm may use or participate in the use of a . . . legal directory listing . . . unless it includes a statement or claim that is false, fraudulent, misleading, or deceptive."

(D.C.D.C. 1978). *See also Parham* v. *Southwestern Bell Telephone Co.*, 433 F.2d 421 (8th Cir. 1970). Thus, the Virginia Court could not defeat an award by bringing its conduct into compliance with the Constitution years after this suit was brought, once it had forced the consumer groups to incur substantial expenses to defend their rights.

Therefore, the reasonableness of the Virginia Court's failure to amend its Rule promptly after *Bates* has no relevance to this case. Because no special circumstances exist which render the award unjust, the District Court acted within its discretion in awarding fees and costs to the consumer groups.

CONCLUSION

The District Court correctly entertained this suit against the Virginia Court. No governmental immunities preclude the consumer groups from obtaining a declaration that the Virginia Court's Rule invades their constitutional rights and an injunction preventing future infringement. Instead, the case law of this Court and strong public policies require the provision of a forum in which persons aggrieved by state judges' unconstitutional conduct can vindicate their rights.

Having prevailed against state officials, the consumer groups are entitled to reimbursement for their fees and costs under the Civil Rights Attorney's Fees Awards Act from state appropriations. The award granted in this case fulfills Congress' objective that reimbursement be available to litigants acting as private attorneys general

who vindicate significant public interests. Therefore, the District Court decision should be affirmed.

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